RE LOW NAI BROTHERS & CO.

[O.C.J. (Gill J.) December 19, 1968]
[K.L. — Bankruptcy No. 7 of 1967]

Bankruptcy — Execution against debtor — Debt due to debtor attached by creditor — Attachment not complete before date of receiving order against debtor — Whether creditor entitled to retain the sums attached — Bankruptcy Act, 1967, s. 50.

Mercantile Law — English Companies Act, 1947, s. 115(2) — Whether applicable in West Malaysia — Civil Law Ordinance, 1956, s. 5(1).

In this case a receiving order was made against Low Nai Brothers & Co. on March 20, 1967. In their statement of accounts the bankrupts disclosed that one of the debtors from whom money was due to them was the Municipality of Ipoh. The Official Assignee claimed the debt from the Municipality, but the Municipality stated that it had paid the money into court in compliance with garnishment notices served on it. On inquiry from the Senior Assistant Registrar, High Court, it was ascertained that the sum received had been paid over to the three respondents on April 5, 1967. The Official Assignee demanded a refund of these sums but the respondents denied liability to refund. The Official Assignee then applied to the court for a declaration that the receipt of the sum by the respondents were void against him as trustee of the property of the bankrupts.

Held: (1) as the respondents had not completed the attachment of the debt due to the bankrupts before the date of the receiving order they were not entitled to retain the sums received by them as against the Official Assignee;

(2) the attachment by the respondents of the debt due to the debtors by the Ipoh Municipality was under an available act of bankruptcy, of which the respondents must be taken to have notice;

(3) section 115(2) of the English Companies Act, 1947 was applicable in West Malaysia as being part of the mercantile law but in this case the respondents had not made a case for the court to exercise its discretion under that provision of the English Act.

Cases referred to:—

(1) *George* v. *Tompson's Trustee* [1949] 1 Ch. 322.

(2) *Re Lupkovics, Ex parte The Trustee* v. *Freville* [1954] 1 W.L.R. 1234.

(3) *Figg* v. *Moore Brothers* [1894] 2 Q.B. 690.

(4) *Re Chop Kee Chiang* [1933] M.L.J. 283.

(5) *Seng Djit Hin* v. *Nagurdas Purshotumdas & Co.* [1923] A.C. 445.

BANKRUPTCY.

L. Kandan for the applicant.

S.W.S. Davidson for the respondents.

Cur. Adv. Vult.

Gill J.: This is a motion by the Official Assignee for a declaration that the receipt by the first respondents of the sum of $10,281.70 in Ipoh High Court Civil Suit 407 of 1965, by the second respondents of the sum of $3,946.36 in Ipoh High Court Civil Suit 556 of 1965 and by the third respondents of the sum of $11,421.33 in Ipoh High Court Civil Suit 531 of 1965 on or after 5th April, 1967 pursuant to garnishment proceedings in each of those civil suits in which the respondents were the judgment creditors and the three bankrupts the judgment debtors, are void against him as trustee of the properties of the bankrupts under the provisions of the Bankruptcy Act, 1967, in that the said sums of money were received by the respondents after the receiving order was made against the said bankrupts on the 20th day of March, 1967, and for an order that the respondents do pay the said sums to him as the trustee in bankruptcy.

The facts in support of the motion as set out in the affidavit of the Senior Assistant Official Assignee, Mr. Muthiah Rajendram, affirmed on 18th December, 1967 and filed in these proceedings are as follows. A receiving order against Low Nai Brothers and Company of No. 35, Jalan Pekeliling, Kuala Lumpur on the debtors' own petition filed on 7th March, 1967 was made by this court on 20th March, 1967. On the same day How Nai alias Low Nai, How It alias Low Aik and How Tiew Soo as the three partners of the firm were adjudged bankrupt. Notices of receiving and adjudication orders were published in the *Government Gazette* on the 6th day of April, 1967 *vide* Notification Nos: 1257 and 1226.

On the 27th day of March, 1967 the said bankrupts filed their joint statement of affairs disclosing their assets and liabilities. In the list of persons said to be indebted to the bankrupts filed in court on 31st day of March, 1967 one of the debtors disclosed was the Municipality of Ipoh. On the 9th day of April, 1967 the Ipoh Municipality was informed of the receiving and adjudication orders and requested that the amount due to the bankrupts be paid to the Official Assignee.

On the 22nd day of April, 1967 the Official Assignee received from the Municipality a letter dated 20th April, 1967 stating that it had paid into the High Court, Ipoh the sums of $1,395.33 and $26,172.85 on the 29th day of April, 1966 and the 18th day of January, 1967 respectively in compliance with the garnishment notice served on it.

On 24th April, 1967 the Official Assignee requested the Senior Assistant Registrar, High Court, Ipoh for the payment to him of the said sums of money paid into court, in view of the receiving and adjudication orders. On 8th May, 1967 the official assignee received a memo dated 6th May, 1967 from the Senior Assistant Registrar confirming the receipt of a total sum of $27,868.18 from the Ipoh Municipality and stating that the said sum of $27,868.18 received by him under garnishment notices was distributed as follows after deducting a sum of $557.33 as Sheriff's commission:

Civil Suit No.	*Plaintiff*	*Amount Paid to Plaintiff's Solicitors*	*Date of Voucher*
1. 407/65	Guthrie & Co. (M) Ltd. now known as Guthrie & Co. (Far East) Ltd.	$ 1,661.46	13.6.66
2. 407/65	Guthrie & Co. (M) Ltd. now known as Guthrie & Co. (Far East) Ltd.	10,281.70	5.4.67
3. 556/65	United Engineers Co. Ltd.	3,946.36	5.4.67
4. 531/65	Ban Aik Kee Co.	11,421.33	5.4.67
	Total:	$27,310.85	

The sum of $1,661.46 having been received by the first respondents before the date of the receiving order, the Official Assignee demanded refund of the balance of $25,649.30 received by the respondents as the creditors of the bankrupts after the date of the receiving order. On 19th July, 1967 Messrs. Gibb & Co., acting for the respondents notified the Official Assignee that the clients denied liability to refund the money received by them from the High Court, Ipoh.

The respondents do not dispute the facts relied on by the Official Assignee in support of his motion. In his affidavit affirmed on 24th January, 1968 and filed in these proceedings Wong Wee Fah, the branch manager of the first respondents in Ipoh, has stated that the first respondents obtained judgment against the firm of Low Nai Brothers and Company for a sum of $28,013.46 and $120.00 costs in Ipoh High Court Civil Suit 407 of 1965 on the 12th day of October, 1965, that their solicitors served a notice of garnishment in the same suit on the Ipoh Municipality on the 21st day of February, 1966, that their solicitors served a garnishment summons on the Municipality on the 28th day of March, 1966 and that the Municipality paid into court the sum of $26,172.85 on 18th January, 1967 in compliance with the garnishment notices issued by the three respondents.

It is contended on behalf of the Official Assignee that the respondents had notice of the commission of an available act of bankruptcy by the debtors when they issued execution against the property of the debtors in the abovementioned civil suits in Ipoh High Court, and that as the attachment by the respondents was not completed by the receipt of their debt before the date of the receiving order they are not entitled to retain the said sums of money received by them as against the Official Assignee by reason of the provisions of section 50(1) of the Bankruptcy Act, 1967.

The respondents contend that they did not have notice of the commission of any available act of bankruptcy until after payment to them of the abovementioned amounts on 5th April, 1967, and that execution levied against the bankrupt firm by them in the abovementioned civil suits should not be construed as an available act of bankruptcy within the meaning of section 50(1) of the Bankruptcy Act, 1967. They also contend that they did not have notice of the presentation of any bankruptcy petition by or against the bankrupt firm until after payment to them of the sums mentioned. They further contend that the payment by the Municipality of the sums mentioned into court on 18th January, 1967 in compliance with the garnishment notices served by the three respondents should be regarded as completion of the attachment for the purpose of section 50(1) of the Bankruptcy Act, 1967.

It is clear that there is no dispute as regards the payment to the first respondents of the sum of $1,661.46 in Civil Suit 407 of 1965 on 13th June, 1966. As regards the payment out of $25,649.39 by the Senior Assistant Registrar, High Court, Ipoh, it is common ground that vouchers in respect of such payments were issued on 5th April, 1967 but that the respondents did not physically receive the money until 14th April, 1967.

As far as the Official Assignee is concerned the issue would appear to be very simple. He relies solely on section 50(1) of the Bankruptcy Act, 1967, which reads as follows:—

> "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Section 50(2)(b) of the Act says that for the purpose of this Act "an attachment of a debt is completed by receipt of the debt."

It is to be observed that, quite apart from the question as to whether or not he has notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor, a creditor who has attached any debt due to the debtor is not entitled to retain the benefit of such attachment against the Official Assignee unless he has completed the attachment by receipt of the debt before the date of the receiving order.

The terms of section 50(1) and section 50(2) of our Act are similar to those of section 40(1) and section 40(2) of the English Bankruptcy Act, 1914. As to the construction of the provisions of the English Act, in so far as

garnishee orders are concerned, it was held in *George* v. *Tompson's Trustee* [1] that the test was, not whether there had or had not been a garnishee order absolute, but whether the garnishee proceedings had resulted in actual payment before the making of the receiving order. The judgment creditor in that case had obtained a garnishee order, upon which the garnishee paid the money into the County Court. The creditor applied for payment out, but owing to the County Court's lack of funds, the money was not available until after the receiving order had been made. It was therefore held that the creditor had not "completed his attachment" and was not entitled to the money. That decision was considered and applied in *Re Lupkovics, Ex parte The Trustee* v. *Freville,*[2] which also deals with attachment of moneys payable by the Crown.

It was urged by counsel for the respondents that the two cases I have mentioned in the last paragraph are not binding upon this court. That of course is perfectly true. But they are of such persuasive authority that I am in full agreement with them. In the present case the receiving orders against the debtors were made on 20th March, 1967. The respondents as creditors received the benefit of the attachment of the debts due to the debtors by the Ipoh Municipality on 14th April, 1967. They are therefore not entitled to retain such benefits as against the Official Assignee. They are only entitled to the Sheriff's costs, and it is in evidence that such costs were deducted before the money was paid out to them.

The question of notice to the respondents of the presentation of the bankruptcy petition by the debtors or of the commission by the debtors of an available act of bankruptcy is to my mind wholly irrelevant to these proceedings. The respondents are probably right in their contention that they had no notice of the bankruptcy petition, but I do not see how they can argue that they had no knowledge of the commission of an act of bankruptcy on the part of the debtors. Section 3(1)(e) of the Bankruptcy Act, 1967 provides that a debtor commits an act of bankruptcy

> "If execution issued against him has been levied by seizure of his property under process in an action or in any civil proceedings in the High Court, Sessions Court or Magistrate's Court where the judgment, including costs, is for an amount of five hundred dollars or more."

The attachment by the respondents of the debt due to the debtors by the Ipoh Municipality was clearly an available act of bankruptcy, of which the respondents must be taken to have had notice. This is clear from the decision of *Figg* v. *Moore Brothers* [3] which was followed in *Re Chop Kee Chiang,*[4] in which it was held that an execution creditor is not entitled to retain the benefit of his execution as against the Official Assignee if the judgment debtor is subsequently adjudged bankrupt and that any proceeds of the execution received by him must be paid by him to the Official Assignee.

It was lastly urged on behalf of the respondents that the court should grant discretionary relief as provided in section 115(2) of the English Companies Act, 1947, the provisions of which are applicable in this country by reason of the provisions of section 5(1) of the Civil Law Ordinance, 1956 which reads as follows —

> "In all questions or issues which arise or which have to be decided in the States of Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

Section 115(2) of the English Companies Act, 1947 reads as follows:—

> "The rights conferred by sections forty and forty-one of the Bankruptcy Act, 1914, on the official receiver or trustee in bankruptcy in relation to executions against the goods or other property of the debtor and attachments of debts due to the debtor may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

As was stated by the Privy Council in *Seng Djit Hin* v. *Nagurdas Purshotumdas & Co.*[5] the first thing to be settled is: has a question or issue arisen in this court "with respect to mercantile law generally." The question to be decided here is a question as to the law of bankruptcy. I do not think there can be any doubt that the law of bankruptcy is part of the mercantile law. I am therefore of the opinion that the court has discretion to apply the provisions of section 115(2) of the English Companies Act, 1947. But the next question which naturally arises is: have the respondents made out a case for the court to exercise such discretion? In my opinion they have not succeeded in doing so. *Williams* on Bankruptcy (17th edition) at page 328 states that where section 115(2) of the Companies Act, 1947 applies,

> "The court has apparently a free hand to do what is right and fair in the circumstances of the case, but it seems that some species of imposition must be shown to have been practised by the debtor upon the execution creditor, whereby the creditor has been unfairly delayed and deprived of his rights, or else that the creditor has been otherwise unfairly kept out of his money or possession."

George v. *Tompson's Trustee* (1) is mentioned in a foot-note at page 335 of *Williams* on Bankruptcy as one of the types of cases to which the new discretionary relief would seem to be applicable. In the present case, however, there is no evidence whatsoever of any species of imposition having been practised by the debtor upon the respondents as execution creditors, whereby they were unfairly delayed and deprived of their rights. Nor is there an iota of evidence that they were otherwise unfairly kept out of their money. The money was in court all the time, and if they were not diligent enough to take steps to have it paid out to them earlier they have only themselves to blame. In the circumstances I feel that it would be wrong for this court to exercise any discretion in favour of the respondents.

For the reasons I have stated I would make the declaration asked for on the motion and an order that the respondents do pay to the Official Assignee the money received by them. They must also pay the costs of these proceedings in proportion to the amounts received by them.

Motion granted.

Solicitors: *Shearn, Delamore & Co.; Gibb & Co.*

MERCANTILE BANK LTD., IPOH v. YOON SIEW KANG

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian F.J. and Abdul Aziz J.) January 27, 1969]

[Ipoh — Federal Court Civil Appeal No. X.80 of 1967]

Bills of Exchange — Cheque — Dishonoured cheque — Holder in due course — Notice of defect in title of person negotiating it — Liability of drawer — Bills of Exchange Ordinance, 1949, ss. 29, 30, 31, 38 & 73.

This was an appeal against the decision of MacIntyre J. ([1967] 2 M.L.J. 226). The appellants, who had granted overdraft facilities to a firm of stockbrokers, had among securities held by them, cheques drawn in favour of the firm by others, including six cheques drawn by the respondent. Subsequently these six cheques were negotiated to the appellants. When the cheques were dishonoured upon presentation, the appellants sued the respondent on the amount of the cheques. The learned trial judge dismissed the action on the ground that the appellants had not taken the cheques in good faith as they had notice of a defect in the title of the firm of stockbrokers and therefore their claim as holders in due course must fail. He held that the respondent had issued the cheques to help the firm to conceal from the appellants the true financial position of the firm, and that the cheques were issued without consideration; as the firm of stockbrokers could not have sued the respondent on them, the appellants who purchased the cheques from the firm, with notice of the defect, were not to be placed in a better position than the firm. On the question of notice, he held that if the appellants had probed into the matter they would have discovered that the cheques had been given to the firm for no consideration at all and if they had scrutinized the cheques, they would have found them apparently worthless as negotiable instruments because their dates had been altered.

Held, allowing the appeal: (1) the cheques were complete and regular on their face and although the dates on them had been altered, these as the learned trial judge found could only have been done by the respondent and the directors of the firm in pursuance of a conspiracy and therefore the respondent could not rely on them to avoid the cheques;

(2) on the facts the appellants took the cheques in good faith and for value, and had no notice of any defect in the title of the firm who negotiated them;

(3) the appellants were therefore entitled as holders in due course to recover the amount of the cheques.

Cases referred to:—

(1) *Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 353.

(2) *London Joint Stock Bank* v. *Simmons* [1892] A.C. 201.

(3) *Swan* v. *The North British Australasian Company* (1863), 159 E.R. 73; 2 H. & C. 175.

(4) *Jones* v. *Gordon* (1877), 2 App. Cas. 616.

(5) *Manchester Trust* v. *Furness* [1895] 2 Q.B. 539.

(6) *Baker* v. *Barclays Bank Ltd.* [1955] 2 All E.R. 571.

The following cases were also cited in argument: *Lloyds Bank Ltd.* v. *Swiss Bankverein* 108 L.T. 143, *Arab Bank Ltd.* v. *Ross* [1952] 1 All E.R. 709, [1952] 2 Q.B. 217, *A.E.G. Carapiet* v. *A.Y. Dorderian* A.I.R. 1961 Cal. 359, 362, *Browne* v. *Dunn* (1894), 6 The Reports 67, H.L., *V. Kondiah* v. *C.P. Pulliah* A.I.R. 1960 Andhra Pradesh 121.

FEDERAL COURT.

G.S. Hill (*N.T. Rajah* with him) for the appellants.

N. Sharma for the respondent.

Cur. Adv. Vult.

Suffian F.J.: MacPhail & Co., a firm of stockbrokers now in liquidation, had overdraft facilities from the Ipoh branch of the Mercantile Bank Ltd., the plaintiff in the lower court and the appellant here. Among other things the bank held as securities cheques drawn in favour of MacPhail by others, including six cheques amounting to $72,591 drawn by Yoon Siew Kang, a remisier working for MacPhail, the defendant in the lower court and the respondent here, and when Mr. Braine, the bank manager, thought MacPhail were sinking, he got one of MacPhail's directors, to negotiate these six cheques to the bank. These cheques were dishonoured when presented and the bank sued the defendant for the amount. At the end of the trial which, by consent, proceeded on the basis that the bank was claiming as a holder in due course, the bank's claim was dismissed and the bank appeals to this court.

The question for decision is a simple one. These cheques being complete and regular on their face and the bank having taken them for